Supreme Court, U.S.
FILED

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(1)

No.

In The
Supreme Court of the United States
October Term.

ANTONIO ROJAS-ORTEGA

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For the Eleventh Circuit

Submitted By:
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Counsel to the Petitioner

17pp

QUESTIONS PRESENTED

Whether or not the United States District Court for the Southern District of Florida, erred when it denied the Petitioner's Certificate of Appealability, concerning the Petitioner's desire to be present at a hearing and to present evidence concerning the extent of a reduction of sentence that the Petitioner should receive pursuant to a motion to reduce sentence made by the Government?

OFFICIAL REPORT OF LOWER COURT CASE

The Petitioner did not have his case reported at either the District Court or the Appellate court level as it relates to the issue of appealability.

GROUNDS FOR INVOKING JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1241(1). The United States Court of Appeals for the Eleventh Circuit issued an Order on October 19, 1998 denying the issuance of a certificate of appealability. As such, the ninety-day period for filing this petition would fall on Sunday, January 17; as January 18 is a legal holiday, the petition falls due on January 19, 1999; at the close of business.

FEDERAL CONSTITUTIONAL PROVISIONS INVOKED

The Fifth Amendment of the United States Constitution provides for due process of law in the governmental taking of life, liberty or property.

STATEMENT OF THE CASE AND FACTS

The Petitioner filed a motion to vacate sentence, pursuant to 28 U.S.C. Section 2255 on October 2, 1996 in the United States District Court for the Southern District of Florida. The United States filed a motion to reduce sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure on October 20, 1992. The writ and

the motion to reduce sentence were consolidated for purposes of disposition. An order was entered reducing the Petitioner's sentence to five years, without holding a hearing and without allowing him to present evidence. The Petitioner filed a notice of appeal as to the failure to grant an evidentiary hearing concerning how big a sentence reduction should take place.

On May 18, 1998 the District Court Judge, James Lawrence King, issued an Order denying a certificate of appealability as to both the Petitioner's 2255 and the Government's Rule 35 motion and the Court's failure to grant an evidentiary hearing.

On October 19, 1998 the United States Eleventh Circuit Court of Appeals refused to issue a certificate of appealability.

ARGUMENT NUMBER 1

THE PETITIONER PRESENTED A SUBSTANTIAL SHOWING OF DENIAL OF A CONSTITUTIONAL RIGHT UNDER CIRCUMSTANCES WHERE HE HAD A MOTION TO REDUCE HIS ORIGINAL SENTENCE FILED BY THE GOVERNMENT ON HIS BEHALF, BUT WHERE THE DISTRICT COURT REFUSED TO GRANT AN EVIDENTIARY HEARING TO PRESENT EVIDENCE, TO CROSS EXAMINE WITNESSES AND TO MAKE ARGUMENT CONCERNING THE AMOUNT OF REDUCTION OF SENTENCE MR. ROJAS SHOULD RECEIVE.

A Certificate of Appealability should issue if the claims raised are not squarely foreclosed by statute, rule or authoritative court decision, or if the factual basis is not lacking in the record. Baldwin v. Maggio, 704 F.2d 1325, 132-27 (5th Cir. 1983). A certificate of appealability shall be issued when a person demonstrates that he has made a substantial showing of the denial of a constitutional right. See 28 U.S.C. Section 2253 (c)(2); and also Hardwick v. Singletary, 126 F.2d 1312 (11th Cir. 1997).

In this case, the Government filed a motion for reduction of Mr. Rojas' sentence by 60 months. The District Court reduced the sentence by 60 months without the benefit of a hearing and based on the Government's view that the large marijuana seizure that Mr. Rojas had assisted in was merely a sacrifice load, as opposed to the reality of the situation, that the Government was responsible for no arrests being made incident to the seizure of drugs. It is submitted that the Petitioner had a right to challenge the veracity and the factual posture that the government took and to present evidence so that he might get the full benefit of his substantial assistance efforts. By failing to grant a hearing on the Government's motion to reduce his sentence, the Court created a substantial likelihood that the petitioner would receive less than he was entitled to. United States v. Bailey, 116 S. Ct. 501 (1995); and Santobello v. New York, 404 U.S. 257 (1971).

CONCLUSION

The writ of certiorari should issue to the District Court, permitting the Petitioner to appeal the Court's failure to grant an evidentiary hearing.

I HEREBY CERTIFY that a copy of the foregoing was furnished, by mail, to Neal Stephens, Assistant US Attorney, 99 NE 4 Street, Miami FL 33132 and to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 this 15th day of January, 1999.

Respectfully submitted,

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